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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1031

WALTER KOCHER a/k/a WALTER A. KOCHER and ROSE KOCHER,

Petitioners,

—against—

UNITED STATES OF AMERICA; COMMERCIAL BANK OF SOLEURE; ERIC KOCHER; and STATE TAX COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1972

No. .....

Walter Kocher a/k/a Walter A. Kocher
and Rose Kocher,

Petitioners,

—against—

United States of America; Commercial Bank of Soleure;
Eric Kocher; and State Tax Commission,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on October 30, 1972, affirming a judgment of the United States District Court for the Southern District of New York entered in the above case on November 19, 1971.

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 329 F. Supp. 1079. The opinion of the United States Court of Appeals for the Second Circuit is reported at 368 F. 2d 503.

The opinion of the District Court is included in the appendix to this petition on pages 16a-20a. The opinion of

the Court of Appeals is included in the appendix to this petition on pages 1a-13a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit is dated, and was entered on, October 30, 1972. The judgment of the United States District Court for the Southern District of New York is dated, and was entered on, November 19, 1971. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

Questions Presented for Review

The two ultimate questions presented for review are:

1. Whether, where a taxpayer and his wife own real property in the State of New York as tenants in common, a judgment of foreclosure, pursuant to Section 7403 of the Internal Revenue Code (26 U.S.C. §7403) of liens for United States income taxes owed by the taxpayer alone may order sale of the property in its entirety, including the wife's interest therein, or only sale of the interest therein of the taxpayer.

2. Whether, where such liens for income tax are not first liens, the judgment of foreclosure may provide that the Government may purchase the property on the foreclosure sale, and may so provide without limiting the amount to be bid to the amount of the liens plus the expenses of sale.

The questions are those of interpretation of said Section 7403 of the Internal Revenue Code and of 26 U.S.C. §195.

Statutes Which the Case Involves

The statutes involved are Sections 6321 and 7403 of the Internal Revenue Code of 1954 (26 U.S.C. §§6321 and 7403) and Section 195 of Title 31 U.S.C. Said statutes are set out verbatim below:

Section 6321, Internal Revenue Code (26 U.S.C. §6321):

§ 6321. Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Aug. 16, 1954, c. 736, 68A Stat. 779.

Section 7403, Internal Revenue Code (26 U.S.C. §7403):

§ 7403. Action to enforce lien or to subject property to payment of tax

(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) Parties.—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree.—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary or his delegate directs.

(d) Receivership.—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity. Aug. 16, 1954, c. 736, 68A Stat. 874; Nov. 2, 1966, Pub.L. 89-719, Title I, § 107(b), 80 Stat. 1140.

Section 195, Title 31 U.S.C.:

§ 195. Purchase on execution

At every sale, on execution, at the suit of the United States, of lands or tenements of a debtor, the United States may, by such agent as the head of the department or independent agency at whose instance suit was

instituted shall appoint, become the purchaser thereof; but in no case shall the agent bid in behalf of the United States a greater amount than that of the judgment for which such estate may be exposed to sale, and the costs. Whenever such purchase is made, the marshal of the district in which the sale is held shall make all needful conveyances, assignments, or transfers to the United States. R.S. §3470; May 10, 1934, 11:40 a.m. c. 277, § 512, 48 Stat. 758, as amended June 2, 1965, Pub.L. 89-30, § 5, 79 Stat. 119.

Statement of the Case

Nature of the Action

This is an action pursuant to Section 7403 of the Internal Revenue Code to foreclose liens for additional income taxes, and assessed interest, for the years 1943 to 1947 inclusive. The liens arose in 1955, 1959, and 1960, when the additional taxes were assessed. They are on the interests of petitioner Walter Kocher in real property in Tarrytown, New York owned by him and his wife, petitioner Rose Kocher, as tenants in common. The taxes are owed by Mr. Kocher only. The action seeks sale on foreclosure of the property in its entirety, as opposed to a sale merely of Mr. Kocher's interest in it. (R. 26, 30, 31) The tax liens are not first liens; there are four mortgage liens that are prior to them. (R. 24, 48, 58)

The Facts

The property on which foreclosure is sought consists of ten parcels of land assembled by Mr. and Mrs. Kocher in the years 1944 to 1946. Five parcels, constituting a single tract, were acquired in 1944 and 1945 by deeds running to Mr. and Mrs. Kocher as tenants by the entirety. (R. 24, 48)

These parcels are denominated the "Homestead Parcels" since Mr. and Mrs. Kocher live there. The other five parcels, denominated the "Disputed Parcels" because of the issue referred to below, constitute another single tract adjacent to the Homestead Parcels and were acquired in 1946 by deeds running to Mr. Kocher alone. (R. 24, 48) In October 1961, at the request of the Government, Mr. and Mrs. Kocher executed a deed of all ten parcels to themselves as tenants in common to protect the Government against the event that Mr. Kocher would predecease his wife so that, as a tenant by the entirety, she would succeed to the property, by operation of law, free of the tax liens. (R. 48)

The Government moved for partial summary judgment of foreclosure with respect to the Homestead Parcels which was granted by the judgment that was affirmed in the judgment of the Court of Appeals of which review is here sought. (R. 58) The action continues with respect to the Disputed Parcels because of an issue whether (a) those parcels were acquired for a partnership of which Mr. and Mrs. Kocher were the members, so that her interest was acquired before and is, therefore, free of the Government's liens, or (b) Mrs. Kocher's interest, acquired of record by the October 1961 deeds after those liens were filed, came to her burdened with those liens. (R. 52, 58, 64)

The Judgment of the District Court

The judgment of the District Court orders that what shall be sold on the foreclosure sale is the Homestead Parcels in their entirety, not just Mr. Kocher's interest in them. It also orders that the property be sold subject to the prior mortgages.

The Opinion Below

In its opinion, the Court of Appeals (a) held that Section 7403 of the Internal Revenue Code literally provides for the sale of any property in which the delinquent taxpayer has any interest, with the proceeds to be distributed according to the interests of the parties, (b) rejected any reason for requiring any construction other than the literal one, (c) rejected the decision of the Court of Appeals for the Fifth Circuit in *Folsom* v. *United States,* 306 F. 2d 361 (1962) and (d) followed the decisions of the Seventh Circuit in *United States* v. *Trilling,* 328 F. 2d 699 (1964), the Fourth Circuit in *United States* v. *Washington,* 402 F. 2d 3 (1968) cert. denied 402 U.S. 978 (1971) and the Ninth Circuit in *United States* v. *Overman,* 424 F. 2d 1142 (1970).

On the question whether the Government should be permitted to bid on the foreclosure sale, the Court of Appeals held that the provision of Section 7403 of the Internal Revenue Code that "If the property is sold to satisfy a first lien held by the United States, the United States may bid on the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary or his delegate directs" limits the Government's bid only where the Government is a senior lienor not where, as here, it is a junior lienor. It also held that Section 7403 should be construed together with 31 U.S.C. §195 which provides that on execution sales at the suit of the United States the United States may become a purchaser, but that its bid must be limited to the amount of "the judgment for which such estate may be exposed to sale, and the costs." It said that in a tax lien foreclosure action such judgment would include the amounts of any senior liens being foreclosed, and thus the permissible bid would exceed the amount of the tax liens. (In fact the judgment here is for sale subject to the senior liens, and does not foreclose them.)

The Reasons Relied on For Granting the Writ

This petition for a writ of certiorari is on the grounds set out in Rule 19-1(b) of the Rules of this Court. It is submitted that the decision of the Court of Appeals for the Second Circuit (a) is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Folsom* v. *U.S.*, 306 F. 2d 361 (C.A. 5th 1961), and (b) decided two important questions of federal law—the questions presented for review—which have not been, but should be, settled by this Court.

The Basis of Jurisdiction in the District Court

Jurisdiction in the United States District Court for the Southern District of New York in this case is based on Sections 1340 and 1345 of Title 28 U.S.C. and Sections 7401, 7402, and 7403 of Title 26 U.S.C., the action being one arising under the Internal Revenue laws of the United States and being one in which the United States is the plaintiff.

ARGUMENT

1. The Decision of the Court of Appeals for the Second Circuit Is in Conflict With the Decision of the Court of Appeals for the Fifth Circuit in *Folsom* v. *U.S.* 306 F 2d 361 (1962).

There can be no question that the decision of the Court of Appeals for the Second Circuit is in direct conflict with that of the Court of Appeals for the Fifth Circuit in *Folsom* v. *U.S.*, 306 F. 2d 361 (1962). Both cases involve liens for federal income taxes owed by only one of two or more tenants in common of real property. In both cases the Government sought sale on foreclosure of the property in

its entirety, as opposed to a sale of only the taxpayer's interest therein. In both, local law (a) gave the non-taxpayer party or parties the right to undisturbed possession until a sale or a partition in kind pursuant to a judgment in a partition action brought by a proper party and (b) provided that in the event of such an action, the property should be partitioned in kind rather than sold if that could be accomplished in an equitable fashion. Rasch, The New York Law and Practice of Real Property, §§580, 2124, 2205, and 2258; *Wood* v. *Phillips,* 43 N.Y. 152 (1870); *The Country Club Land Association* v. *Lohbauer,* 187 N.Y. 106 (1907); *Folsom* v. *United States,* 306 F. 2d 361 (5th Cir. 1969). *Dimmick* v. *First National Bank of Montgomery,* 228 Ala. 150, 153 So. 207 (1934).

The decision of the Court of Appeals for the Second Circuit is supported, it is true, by decisions of the Court of Appeals for the Seventh Circuit in *U.S.* v. *Trilling,* 328 F. 2d 699 (1964), the Court of Appeals for the Fourth Circuit in *Washington* v. *United States,* 402 F. 2d 3 (1968) and the Court of Appeals for the Ninth Circuit in *United States* v. *Overman,* 424 F. 2d 1142 (1970); and this court denied certiorari in *Washington* v. *United States,* 402 U.S. 978 (1971) where the interest in the property of the non-taxpayer party was an inchoate dower interest. However, the conflict remains, and in 1969 the Circuit Court for the Fifth Circuit in *United States* v. *Gurley,* 415 F. 2d 144 cited its decision in *Folsom* v. *United States* with approval.

We submit that, for the reasons set out below, the question involved is an important one and that the conflict in the Circuits is reason for a review by this Court even though the Circuits are not evenly divided.

2. The Decision of the Court of Appeals for the Second Circuit Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

It is submitted that both questions decided below by the Court of Appeals for the Second Circuit are important questions of federal law which have not been, but which should be, decided by this Court.

(a) ***As to the question whether the sale on foreclosure may be of the property in its entirety or only of the interest of the taxpayer in it.***

The decision of the Court of Appeals that Section 7403 of the Internal Revenue Code permits a sale on foreclosure of the property in its entirety, not merely of the taxpayer's interest in it, is a decision of a question of federal law. That it is an important question is shown, it is submitted, by the fact that the interpretation adopted below is of general application and this means that if it is permitted to stand then in any tax lien foreclosure action sales of the property as an entirety would be permitted regardless of what or how limited is the interest that the taxpayer has in it. Thus such a sale would be permitted where the taxpayer is merely a tenant, perhaps of a few rooms in a great office building. Under established principles of property law, he would have an "interest" in the building and the interpretation given to Section 7403 below would permit sale of the entire building on a foreclosure of tax liens against him. Again such a sale would be permitted where the only interest of the taxpayer in the property is as a mortgagee, and where the owner never has been, and never will be, delinquent in meeting the mortgage payments. Here again, at least in title states, the mortgagee would have an "interest" in the property. Finally such a sale would be permitted when the

taxpayer is a tenant in common of the property as here, but holds only an undivided one percent interest instead of an undivided fifty percent interest.

This Court has not passed on this question. That it should is shown, it is submitted, by the startling consequences of the interpretation made below that are suggested above, and because such an interpretation is not at all required by the language of the statute.

The Court below, like the courts of the Fourth, Seventh, and Ninth Circuits, reached its result by a mechanical and literal reading of Section 7403 of the Internal Revenue Code. That Section in subsection (a) provides that the Attorney General, or his delegate, may bring an action "to subject any property . . . of the delinquent [taxpayer] or in which he has any right, title or interest to the payment of such tax or liability", and in subsection (b) provides for making parties to such action all persons claiming any interest in "the property", and in subsection (c) provides that where a claim or interest of the United States in "the property" is established, the Court may decree a "sale of such property." This reading makes the antecedent of "such property" in subsection (c) not only property "of" the delinquent, but also property "in which he has any right, title or interest."

Such a reading treats words as though they are immutable symbols, each with a single, narrow meaning, and as though the statute were a mathematical formula using such symbols. That such an approach is probably wrong, and should be reviewed by this Court, is compellingly suggested by the fact that the same approach would require the provision of the Section that the Attorney General or his delegate may bring an action to "subject" to the "payment" of the tax "any property . . . of the delinquent, or in which he has any right, title or interest" to be interpreted

to allow the entire property to be taken to pay the tax even though others had a substantial interest in the property.

It is submitted that such a literal, mathematical interpretation is not required. Interests in property are themselves "property" and are thus perfectly idiomatic antecedents for the phrase "such property" in subsection (c) of the statute.

In short it is submitted that Section 7403 is not so nicely drawn that a literal mathematical reading of it may be safely relied on. As Judge Learned Hand said in *Central Hanover Bank & Trust Co.* v. *Commissioner,* 159 F.2d 167, 169 (2d Cir. 1947)

> "There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure."

Under Section 6321 of the Internal Revenue Code (26 U.S.C. 6321) the Government's tax lien attaches to only property and rights to property "belonging" to the taxpayer, not to the whole property in which he has some rights, and Section 7403 of the Internal Revenue Code is manifestly designed to permit enforcement of that lien, not to expand it.

(b) ***As to the question of the Government's right to bid on the foreclosure sale.***

As the opinion of the Court of Appeals states, the question whether under Section 7403 of the Internal Revenue Code the Government should be permitted to bid on the foreclosure sale and, if so, to bid more than the amount of its lien and the expenses of sale, is one that is of first impression in any court. The Circuit Court's support of

its holding that the Government may so bid by reading Section 7403 together with Section 195 of 31 U.S.C. (which applies to sales on execution, not foreclosure sales) is also without precedent, as the Court of Appeals itself points out. The question in each case is, of course, one of federal law.

Section 7403 is the general statute governing enforcement of liens for federal taxes. Section 195 is of general application to sales on execution at the suit of the United States. Both are manifestly important, as is their proper interpretation.

It is submitted that this Court should pass on these questions of the interpretation of these statutes since the interpretation given by the Court of Appeals does violence to what seems clearly expressed Congressional policy, and whether it does such violence should be settled by this Court.

The applicable part of Section 7403 reads "If the property is sold to satisfy a first lien held by the United States, the United States may bid on the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary or his delegate directs."

This provision was added to the statute in 1966 (Act of November 2, 1966, Pub. L. No. 89-719, Tit. I, § 170(b), 80 Stat. 1140). The only legislative report found on it is that of the Senate Committee which said:

> "Where property is sold at a tax lien foreclosure sale, the Internal Revenue Code contains no specific authority authorizing the Federal Government to bid at these sales where it believes that less than full consideration is being offered for the property. Such authority is contained elsewhere, however, in the public statutes (see sec. 195 of title 31 of the United States Code).

It is desirable for the Federal Government to bid in property to prevent its sale at distress prices in order to assure that the Government receives the full value of the property sold or the amount of the Government's tax claim, as well as to protect the interests of the delinquent taxpayer whose property is being sold.

For the reason indicated above, the bill codifies the rule that where the Government brings an action to enforce a tax lien, the Government can bid on the property where the Government holds a first lien. The amount which it may bid under the bill is limited to the amount of its lien, plus selling expenses. Whether or not the Government exercises this authority to bid within the limit set forth in the bill is a matter within the discretion of the Treasury Department." (S. Rep. No. 1708, 89th Cong., 2d Sess., in 1966 U.S. Cong. & Ad. News 3722, 3747).

We submit that the language of this report and the language of both Section 7403 of the Internal Revenue Code and of Section 195 of Title 31 U.S.C. indicate that it is an important part of Congressional policy that public money shall not be used to provide cash to pay off private lienors and therefore that the Government may bid only when cancellation or credit against the debt to the Government may be the medium of payment of the bid. But using public money to provide cash to pay off private lienors is just what occurs when the Government bids on sales where it is a junior lienor and prior private liens are also being foreclosed. Some of the money bid goes to pay off the prior lienors.

This policy is equally violated by using public money to purchase property subject to prior liens, as in the present case, since then the Government is placed in the position

of having to use additional public money to service, or protect against foreclosure of, those prior liens.

Moreover, under the judgment sustained below, half of the amount bid by the Government will have to be paid in cash to Mrs. Kocher so that she can receive the proceeds attributable to her interest in the property, which is not subject to the tax liens. Accordingly, the policy is violated even though the tax liens have in effect become first liens since the sale is to be subject to the prior liens.

In all events, it is submitted that both statutes require the bid to be limited to the amount of the tax lien. Section 195 applies to sales "on execution" at the suit of the United States and the judgment referred to must be a money judgment in favor of the United States—not one in favor of the United States and prior lienors.

CONCLUSION

Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to review the decision below.

Respectfully submitted,

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